IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. 78-492

REV. CHARLES H. NEVETT, et al.,

Petitioners,

vs.

LAWRENCE G. SIDES, etc., et al.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO REVIEW BY CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents conceive that the petitioners' reply memorandum transcends mere matter in reply to respondents' brief in opposition and introduces new matter which, according to a proper interpretation of Rule 24 (b), justifies the presentation of a supplemental brief.

Primarily, under III on page 4 of the reply, petitioners urge review of *Nevett v. Sides* because of this Court's noting of probable jurisdiction in *City of Mobile v. Bolden*, 77-1844, on Oct. 2, 1978, 571 F.2d 238, Fifth Circuit (423 F.Supp. 384, D.C.). While this noting occurred after the filing of respondents' brief in opposition, it was a matter

not appropriate for respondents to mention until and unless presented by petitioners.

In *Bolden* (Mobile), the District Court concluded (right or wrong) that Mobile's form of commission government, coupled with factual discrimination in every conceivable respect, effected impermissible dilution of the black vote, and ordered a new court-created mayor-council form of government, a judgment affirmed by the Court of Appeals from which Mobile appealed to this Court. Petitioners concede that both the District Court and Court of Appeals in *Nevett II* (our case) held that there was an absence of intent to dilute.

We fail to understand petitioners' reasoning in the claim that *Bolden* (Mobile) could be resolved without resolution of whether or not intent to discriminate is a necessary element, but that this would not necessarily resolve the *Fairfield* petitioners' contention that the Court of Appeals' opinions were inconsistent with *White v. Regester*. The District Court, in the first *Nevett,* construed the Court of Appeals as erroneously interpreting *White v. Regester* to mean that dilution existed if the mere *effect* of the at-large election in itself resulted in depriving blacks of electing representatives, even though without design, without regard to the factors enumerated in *Zimmer;* hence, the vacation and the remand following the opinion of June 8, 1976.

The District Court's factual finding on remand that there was not a sufficient showing of invidious discriminatory dilution has been held by the Court of Appeals in the last *Nevett* decision to be not clearly erroneous, affirming the judgment below.

The last sentence of the District Court's second opinion (Petitioners' Appendix, at p. 65) demonstrates that the Court adjudged the evidence to be insufficient to show impermissible dilution without regard to the last sentence which was apparently added purely from the Court's very recent reading of *Washington v. Davis.* We quote the paragraph:

> "Even when 'enhanced' by two or possibly three of the 'extra' factors, proof of factor (3) is insufficient 'in the aggregate' under these criteria to establish a case of 'dilution.' Accordingly, the court finds and concludes that there has not been proved an impermissible dilution of black votes under the existing Fairfield system. It may be noted that there has been no evidence that the claimed 'dilution' was the result of any invidious discriminatory purpose. *Cf. Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)."

The great differences in the evidence and facts, and the results, in *Nevett* and *Bolden* are so vast that there is no logical reason to use the *Mobile* case as a reason for determining that the *Fairfield* case should also be reviewed.

Under II, "Factual Matters," petitioners contend that respondents attempted to pass the responsibility for the low number of black city employees to the personnel board (p. 3).

Respondents' brief makes this point, at p. 2, and the Jefferson County Personnel Board hiring procedure statute (including hiring for municipalities) is quoted (pertinent parts) in our brief appendix, p. 31. What we have contended is unassailable — the City can hire only a Civil Service employee certified by the board from a list of three; supposedly these three having the highest marks on the personnel board examinations, including policemen and firemen.

The City has no control or influence over the Civil Service Board, and if the District Court did not make this clear it was through inadvertence or misunderstanding.

On p. 4, petitioners cite *Hendrix v. McKinney*, M.D. of Ala., No. 74-264-N. We have obtained a copy and find that it involved a suit against the Montgomery County Commission, the governing body of the county (the county has no personnel board for county or city employees). The case has no bearing whatsoever on the case at bar. If this were a suit against the personnel board claiming irregularities in certifying applicants for appointment, the case would be different. However, all that Fairfield can do is to select one of the three candidates certified by the personnel board under the statute.

The only statement made by petitioners having any possible relevance to the subject is (p. 3):

> ". . . the record in the case shows that the city council refused to hire a black who was one of the three persons certified by the Personnel Board to the City for a clerical position. 118a."

What the District Court said about this was (118a):

> "Evidence indicated *only in one instance* has there been a black on the qualification list who has been passed over in recent years in favor of a white." (underscoring ours)

This, of course, indicates there were other instances where blacks were not turned down. Surely petitioners do not contend that the failure to hire a black only in one instance in itself shows a reason for reconstructing the election system of the city.

As to the statement made on page 3 by petitioners that there is nothing in the record (now) before the Court to substantiate the assertion by petitioners that black candidates usually carried their wards, we were correct in that statement. Nothing was before the Court and actually is not now before the Court. There is only a conclusion by

petitioners' counsel that by ward vote blacks "won or tied in wards 1, 2 and 5, out of the six wards." In any case, if this were the case, this would not alter the situation, the voting being at large, with a wide disparity in the population of the wards, a situation which is held to be immaterial according to *Dallas County, Ala., et al. v. Reese, et al.*, 421 U.S. 477, 44 L.Ed.2d 312, 95 S.Ct. 1706, and *Dusch v. Davis*, 387 U.S. 112, 18 L.Ed.2d 656, 87 S.Ct. 1554, in the absence of evidence of invidious discrimination.

The political status in *Fairfield* as far as its council is concerned, uncertain as a matter of long standing because of this litigation, should be stabilized as quickly as possible. An entirely new council is in office (1976 election), is not the subject of attack, and an entirely different situation, we submit, now exists. Respondents urge that the Court decline to review *Nevett v. Sides*.

Respectfully submitted,

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